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In the
SUPREME COURT OF THE UNITED STATES.
October Term, 1924.

No. 149.

NICHOLAS WEBSTER, - - - - - *Appellant,*

versus

ALBERT B. FALL, Secretary of the Interior; J. GEORGE WRIGHT, Superintendent of the Osage Agency, *et al.*, - - - - - *Appellees.*

On Appeal from the District Court of the United States for the Western District of Oklahoma.

REPLY BRIEF OF APPELLANT.

The brief of appellees suggests that the Secretary of the Interior is a necessary party to this suit, and that the same should be dismissed by this Court. They rely upon *Gnerich* v. *Rutter*, 265 U. S. 388, and *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28.

We think neither of these cases in point in this case. This case, as shown by the complaint, was brought to enjoin the appellees from enforcing Sec-

tion 2087 of the Revised Statutes of the United States, and all Rules and Regulations issued under that section, and all unlawful, arbitrary and capricious acts of the appellees, as against this appellant, which deprives the appellant of his property and liberty without due process of law, and in violation of the Fifth Amendment to the Constitution of the United States. The Secretary of the Interior was made a party to the suit, but as he was not within the jurisdiction of the court it was not possible to obtain jurisdiction over him. He could have plead in the suit, but did not. The other defendants to the suit filed their motion to dismiss, but not on the ground that the Secretary had not entered his appearance. (Rec., p. 9.) Nor did their answer take any exceptions to the fact that the Secretary had not entered his appearance, or that service was not had upon him. Under many of the decisions of this Court if the acts of the appellees deprived the appellant of his property without due process of law and in violation of the Fifth Amendment, they could not justify their acts because of instructions from their superior officer. Also the Act of March 3, 1921, gave the appellee, Superintendent of the Osage Agency, a duty to perform independent of the Secretary of the Interior, when it required that the $1,000.00 *quarterly* should be paid "under the supervision of the Superintendent of the Osage Agency". The Superintendent alone was charged with the duty of "supervision".

For more than twenty years this Court has recognized the right, under the circumstances in this case, of a party to enjoin the deprivation of property in violation of the Fifth Amendment, and without making the superior of the party restrained a party to the suit. If the Fifth Amendment is to serve the purpose for which it was adopted there will be no deviation from this rule long established. If Federal officials, by the thousands, can be permitted to deprive persons, under the guise of authority, of their property and liberty without the due process of law required, and they are to have no relief without a suit in the District of Columbia, where they can get service upon the superior officer of the defendant to be charged, then due process of law as required of the United States means nothing to more than 100,000,000 people of the United States, who cannot pay the expense of a trip across the country to Washington, and expensive litigation.

The case of *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 101, was a suit against a postmaster, without making the Postmaster General a party, to enjoin the postmaster from depriving the plaintiff of his property without due process of law, in enforcing orders and regulations issued by the Postmaster General. The trial court refused the writ, and upon direct appeal to this Court, the case was reversed, in an opinion by Mr. Justice PECKHAM, in which he said:

> "The Postmaster General's order, being the result of a mistaken view of the law, *could not*

operate as a defense to this action on the part of the defendant, though it might justify his obedience thereto until some action of the court." (Italics by counsel.)

In referring to the *McAnnulty* case, in *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 325, Mr. Justice PECKHAM said:

> "In the *McAnnulty* case it was held that the order of the Postmaster General to the postmaster in the City of Nevada, not to deliver the mail to the relator, was not a justification for such refusal, because the order was given without authority of law, and the postmaster could, notwithstanding such order, be compelled by mandamus to do his duty and deliver the mail. The case has no relevancy to the one in hand."

The suit of *Public Clearing House* v. *Coyne, Postmaster,* 194 U. S. 504, 505, was for an injunction against the postmaster in Chicago. The Postmaster General was not made a party, and this Court took jurisdiction of same on direct appeal. The suit was to protect due process of law, and this Court approvingly cited *American School of Magnetic Healing* v. *McAnnulty, supra.*

The suit of *John Hill* v. *Henry C. Wallace, Secretary of Agriculture, David H. Blair, Commissioner of Internal Revenue, et al.,* 259 U. S. 44, was a suit wherein it was alleged that the *Future Trading Act* deprived the plaintiffs of their property without due process of law in violation of the Fifth Amendment,

and that the *Act* also violated the Tenth Amendment. The suit was, among others, against the Collector of Internal Revenue, and his superior officer, the Commissioner of Internal Revenue. There was no service on the Secretary of Agriculture and the Commissioner of Internal Revenue. Each member of this Court seems to have agreed that the *Act* was unconstitutional, and the Court speaking by Mr. Chief Justice TAFT, said:

> "The injunction against the Board of Trade and its officers, and the injunction against the *collector of internal revenue* and the district attorney, should be granted, so far as $4 is concerned and the regulations of the act interwoven within it. The court below acquired no personal jurisdiction of the Secretary of Agriculture and the *Commissioner of Internal Revenue* by proper service, and the dismissal as to them was right."

The case of the *Board of Trade et al.* v. *Edwin A. Olsen et al.*, 262 U. S. 1, included among others, Arthur C. Lueder, as postmaster, without making the Postmaster General a party thereto. This Court retained jurisdiction over the postmaster, so evidently the Postmaster General was not a necessary party.

In *Regal Drug Corporation* v. *Justus S. Wardell, as United States Collector of Internal Revenue*, 260 U. S. 386, this Court retained the suit, reversed the lower court, and sustained the right of an injunction to prevent the deprivation of property without due process of law. The Commissioner of Internal Rev-

enue was not a party to this suit, although the superior officer of the collector. The Solicitor General, Mr. BECK, was of counsel in that case.

The case of *Waite* v. *Macy*, 246 U. S. 606, was an injunction suit against the Board of Tea Appraisers, designated by the Secretary of the Treasury, and working under his instructions. The Secretary was not made a party to the suit. Mr. Justice HOLMES, wrote the opinion:

> "No doubt it is true that this Court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality, or fitness for consumption. * * * Again, it is true that courts will not issue injunctions against administrative officers on the mere apprehension that they will not do their duty or will not follow the law. * * * But in this case the *superior of the appellants had promulgated a rule for them to follow* which is alleged to be beyond the powers of the Secretary to make. The Secretary and the board must keep within the statute, which goes to their jurisdiction * * * and we see no reason why the restriction should not be enforced by injunction." (Italics by counsel.)

See also, *Lipke* v. *Lederer, Collector*, 259 U. S. 558; *Corneli* v. *Moore*, 257 U. S. 491; *Nu Fung* v. *White, Commissioner of Immigration*, 259 U. S. 277; *National Life Insurance Company of the United States* v. *National Life Insurance Company, Fred A. Busse, Post-*

master, 209 U. S. 317. And, *Lewis Publishing Company* v. *Morgan, as Postmaster*, 229 U. S. 288, wherein the Postmaster General was not made a party. The opinion was by Mr. Chief Justice WHITE, and Mr. JAMES M. BECK presented the case for the Lewis Publishing Company.

There are many cases in the Federal Reporter wherein the Court entertained the suit for injunction against the local representative of one of the departments, without making the superior officer a party thereto, including the case of *Eastman* v. *Armstrong-Byrd Music Co.*, 212 Fed. 662 (C. C. A.), a suit for injunction against the Postmaster and his assistant, Oklahoma City, to restrain them from enforcing the rules of the Postmaster General, although the Postmaster General was not made a party thereto. See *United States* v. *Lee*, 106 U. S. 197, wherein the President and the Secretary of War had issued orders to one Kaufman, *et al.*, wherein this Court said:

> "Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional, that the courts cannot give remedy *when the citizen has been deprived of his property by force*, his estate seized and converted to the use of the Government without any lawful authority, *without any process of law* and without any compensation, because the President has ordered it and his officers are in possession?

See also, Swigart et al vs. Baker, 229 U. S. 187. See p. 9

"If such be the law of the country, *it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulated liberty and the protection of personal rights.*

"The evils supposed to grow out of the possible interference of judicial action with the exercise of powers of the Government essential to some of its most important operations, will be seen to be small indeed compared to this evil, and much diminished, if they do not wholly disappear, upon a recurrence to a few considerations." (Italics by counsel.)

The case of *Gnerich* v. *Rutter*, 265 U. S. 388, obviously is not controlling, as the case did not involve the "construction or application of the Constitution of the United States", nor the "constitutionality of any law of the United States", as the appeal would have been direct to the Supreme Court and not to the Circuit Court of Appeals. *(State of Ohio ex rel. Allen J. Seney* v. *Swift & Company*, 260 U. S. 146.) And the Supreme Court would not have had jurisdiction to hear same on appeal from the Circuit Court of Appeals. By going direct to the Circuit Court of Appeals, Gnerich would have been bound on all questions, and could not have had a second appeal. *Swift* case, *supra.* The reading of the opinion by this Court, and in the 277 Federal 632, seems conclusive, that the case was not such an one as is now before the Court.

The Jurisdiction of the District Court.

In addition to the cases cited in appellant's brief, we would call attention to *Smithers* v. *T. Smith et al.*, 204 U. S. 632; *Hart* v. *B. F. Keith*, 262 U. S. 272.

The Secretary of the Interior can have no interest in an unconstitutional statute. In *Osborn* v. *Bank of United States*, 9 Wheaton 738, Chief Justice MARSHALL said:

> "The counsel for the appellants are too intelligent, and have too much self-respect, to pretend that a void act can afford any protection to the officers who execute it. They expressly admit that it cannot.
>
> "It being, then, shown, we think conclusively, that the defendants could derive neither authority nor protection from the act which they executed, * * * the only real question in the cause is, whether the record contains sufficient matter to justify the court in pronouncing a decree against the defendants."

Respectfully submitted,

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